RECEIVED
FEB 22 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 79-5932

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

JOHN DOE AND JANE ROE

v.

STATE OF DELAWARE

On Appeal From the Supreme Court of Delaware

APPELLANTS' OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

MICHAEL BOUDIN
ROBERT GAGE
GREGG H. LEVY
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
202-452-6000

GARY A. MYERS
Community Legal Aid Society, Inc.
144 East Market Street
Georgetown, Delaware 19947
302-856-0038

Counsel for Appellants

February 1980

TABLE OF CONTENTS

		Page
I.	THE DELAWARE TPR STATUTE IS UNCONSTITUTIONALLY VAGUE AND INDEFINITE.	1
II.	IT IS UNCONSTITUTIONAL TO TERMINATE PARENTAL RIGHTS BASED ON A MERE PREPONDERANCE OF THE EVIDENCE	4
III.	DUE PROCESS FORBIDS TERMINATION FOR LACK OF A COMPELLING STATE INTEREST.	7
CONCLUSION		9

TABLE OF AUTHORITIES

Addington v. Texas, 441 U.S. 418 (1979). 4, 5, 6

Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976). 3, 4

Davis v. Page, 442 F. Supp. 258 (S.D. Fla. 1977) . . . 3

Davis v. Smith, 583 S.W.2d 37 (Ark. 1979). 4

Gelling v. Texas, 343 U.S. 960 (1952). 2

Grayned v. City of Rockford, 408 U.S. 104 (1972) . . . 3

In Re Dingee, 328 A.2d 139 (Del. 1974) 2

In Re Heidi T., 151 Cal. Rep. 263 (1978) 4

In re Winship, 397 U.S. 358 (1970) 6

In the Matter of Three Minor Children, 406 A.2d 14 (Del. 1979). 2

Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968) 2

Matter of C.L.T., 597 P.2d 518 (Alaska 1979) 4

Matter of Welfare of Rosenbloom, 266 N.W.2d 888 (Minn. 1978) 4

Parham v. J.R., 61 L. Ed.2d 101 (1979) 5

Pierce v. Society of Sisters, 268 U.S. 510 (1925). . . 7

Prince v. Massachusetts, 321 U.S. 158 (1944) 5

Quilloin v. Walcott, 434 U.S. 246 (1978) 5

Page

Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976) 3, 7

Sims v. State Dept. of Public Welfare, 438 F. Supp. 1179 (S.D. Tex. 1977), rev'd, 99 S.Ct. 2371 (1979) . 4

Smith v. Organization of Foster Families, 431 U.S. 816 (1977) 2

Vance v. Terrazas, 48 U.S.L. Wk. 4069 (Jan. 15, 1980). 6

Wisconsin v. Yoder, 406 U.S. 205 (1972). 7

CONSTITUTION AND STATUTES

Constitution of the United States:

Fourteenth Amendment 6

13 Del. Code Section 1103(4) . . . . . passim

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5932

JOHN DOE AND JANE ROE

v.

STATE OF DELAWARE

On Appeal From the Supreme Court of Delaware

APPELLANTS' OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

This appeal presents three substantial federal issues each of which, standing alone, would justify plenary consideration: the unconstitutional vagueness of the Delaware TPR statute, the termination of the parent-child relationship based on a mere preponderance of the evidence, and the need for a compelling state interest to justify such termination. The State's motion to decide these issues summarily cannot be justified in light of the square conflict of the decision below with decisions of lower federal courts on each of the three issues, the broad applicability of the issues to hundreds or thousands of similar cases each year, and the inconsistency of the decision below with this Court's opinions in analogous cases.

I. THE DELAWARE TPR STATUTE IS UNCONSTITUTIONALLY VAGUE AND INDEFINITE.

In its motion to dismiss or affirm, the State implicitly concedes that the statutory terms "not fitted" and "best interests" are on their face too vague to meet due process requirements of precision and fair warning. In fact, this Court has itself criticized or condemned similar terms as unduly

vague.*/ Instead, the State asserts that "[a]ssuming arguendo that the statutory language is unconstitutionally vague on its face, that imprecision may be cured by narrowing court interpretations." State motion 11.

The defect in this argument is that the Delaware TPR statute has not been refined or limited by "narrowing court interpretations." Indeed, the Delaware Supreme Court below refused to effect a narrowing interpretation; it reasoned, as it had on previous occasions, that "unfitness does not require precise definition to be constitutionally sound." App. 7a, quoting In the Matter of Three Minor Children, 406 A.2d 14, 19 (Del. 1979) (addressing both "unfitness" and "best interests"). Similarly, in the other prior Delaware decision cited to support a "narrowing" construction -- In Re Dingee, 328 A.2d 139, 140 (Del. 1974) -- the Delaware Supreme Court flatly rejected the view that any narrowing construction was required and specifically asserted that "each case must be decided on its own peculiar facts." Id. Dingee is also the source of the circular definition, repeated in the lower court's decision in the present case, that "not fitted" means "unfitted for parental duties." App. 7a, quoting id.

In other words, contrary to the State's position that the Delaware Supreme Court has narrowed the statute, the Delaware Supreme Court itself has said that no such narrowing is necessary in its view, and that it will decide "each case . . . on its own peculiar facts." The constitutional

---

*/ See, e.g., Smith v. Organization of Foster Families, 431 U.S. 816, 835, n.36 (1977) (characterizing as "vague" the phrase "the best interests of the child"); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 689 (1968) (finding unconstitutionally vague the following terms: "not suited for young persons," "acceptable," "proper"); Gelling v. Texas, 343 U.S. 960 (1952) (finding unconstitutionally vague "such character as to be prejudicial to the best interests of the people").

vice of this procedure, of course, is that it leaves lawyers, litigants and lower court judges with no clarifying link between the factual evidence in any other case and the conclusory statutory finding.*/ This means that there is no "reasonable opportunity to know what is prohibited" and a substantial likelihood that the statute will be enforced "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

The State concedes that the opinion below squarely conflicts on the vagueness issue with the recent federal court decision in Alsager v. District Court.**/ Alsager, a thoughtful and well reasoned opinion, has been followed in two other significant decisions, each of which also conflicts with the opinion below.***/ Thus, the State's assertion that Alsager is a "judicial aberration" that "stands appropriately alone in its analysis" is plainly wrong. State motion 13. Where three recent decisions are in direct conflict with the decision below on the constitutional issue, there is no basis for the State's suggestion that the question presented is so

---

*/ This case is a compelling example: the Supreme Court's decision merely recites facts (App. 14a) and then asserts that "unfitness" and "best interests" are shown by "the undisputed evidence in the record" without further explanation. App. 15a.

**/ Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd on other grounds, 545 F.2d 1137 (8th Cir. 1976), discussed and quoted at J.S. 12.

***/ Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976), and Davis v. Smith, 583 S.W.2d 37 (Ark. 1979). In addition, Alsager has been cited with approval by several other federal courts. E.g. Davis v. Pace, 442 F. Supp. 258, 262 (S.D. Fla. 1977).

insubstantial that the case should be summarily affirmed or dismissed.

II. IT IS UNCONSTITUTIONAL TO TERMINATE PARENTAL RIGHTS BASED ON A MERE PREPONDERANCE OF THE EVIDENCE

At least five different courts, including two recent lower federal court decisions, have held that before a parental relationship may be involuntarily terminated, due process requires a higher standard of proof than the preponderance of the evidence standard employed by the Delaware courts.*/ The State's motion does not deny that there is a direct constitutional conflict between this series of lower court decisions and the decision of the Delaware Supreme Court in this case. In addition, this Court's analysis in Addington v. Texas, 441 U.S. 418 (1979), directly supports a requirement of a higher burden of proof standard where interests of great "weight and gravity" are at stake and "a significant deprivation of liberty" is involved. J.S. 16-17.**/

The State's basic argument is that a higher standard of proof is not required in TPR proceedings "because of the competing interests of the children." State motion 14. This argument utterly misconceives the "liberty" interest in the family relationship recognized by decisions of this Court. The Constitution protects "the family as a unit" as one of our

*/ Sims v. State Department of Public Welfare, 438 F. Supp. 1179 (S.D. Texas 1977) (three-judge district court), rev'd on procedural grounds, 99 S. Ct. 2371 (1979); Alsager v. District Court, supra; Matter of C.L.T., 597 P.2d 513 (Alaska 1979); Matter of Welfare of Rosenbloom, 266 N.W.2d 888 (Minn. 1978); In Re Heidi T., 151 Cal. Rep. 263 (1978).

**/ The State's motion explicitly concedes that "of course . . . the freedom to maintain a natural family is a liberty interest protected by the Due Process Clause." State motion 15.

fundamental values (Parham v. J.R., 61 L. Ed.2d 101, 113 (1979)), and this Court's decisions safeguard the "private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). Thus, a higher standard of proof is required before that unit or realm can be sundered, not because the interests of parents are favored over the interests of children, but because the constitutional value creates a bedrock presumption that parents and children should remain together save where an overwhelming justification is shown for usurping that "custody, care and nurture of the child [which] reside first in the parents . . .." Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

By contrast, the State's motion rests on the remarkable assumption that, while the parents may have a protected liberty interest in maintaining the unity of the family, the children have a presumptive "competing" interest in escaping their natural family and entrusting themselves to the care of state agencies, or to foster families where the state agencies may assign them. Any such conception is so alien to the constitutional value reflected in this Court's prior decisions that the State's defense underscores the need for plenary review.*/ In any event, the State's analysis is clearly not one that justifies summary disposition in the face of the general principles of Addington and the specific holdings of five other courts inconsistent with the decision below.

---

*/ The implicit suggestion that the children are quite likely to be better off in the care of the State is also remarkable in the context of the present record. In describing the "facts," the State's motion asserts blandly that a psychologist witness "determined that Amy, the oldest child, was frightened and insecure and still bore the scars of her earlier experiences." State motion 7. While the implication of the State's motion is that these earlier experiences were inflicted by her natural parents, the fact is that the psychologist made no such statement (see Tr. 238, Dec. 8, 1976); on the contrary, the psychologist's testimony on cross-examination indicates she was testifying about Amy's experiences in being shuttled through nine foster homes while in the custody of the State. Tr. 241-42, Dec. 8, 1976.

Here, as in Addington, "civil labels and good intentions" cannot mask the actual impact of a mistaken judgment on the family affected by the exercise of state power. 441 U.S. at 427, quoting In re Winship, 397 U.S. 358, 365-66 (1970). Far from distinguishing Addington, the State's motion actually concedes the similarities to this case. State motion 18-19. Since due process requirements reflect "the degree of confidence our society thinks [the fact finder] should have in the correctness of factual conclusions . . ." (id. at 423), it is impossible to justify here a standard of proof less demanding than this Court found to be requisite in Addington. If anything, this is a stronger case for a higher standard. J.S. 17-18.

This Court's recent decision in Vance v. Terrazas, 48 U.S.L. Wk. 4069 (Jan. 15, 1980), further supports plenary consideration of this case.*/ There, a divided Court sustained a Congressional statute requiring a preponderance of evidence in an expatriation proceeding, despite this Court's own "decided preference for requiring clear and convincing evidence to prove expatriation." Id. at 4073. The Court there rested directly upon Congress' specific exercise of its constitutional powers, including its "express power to enforce the Fourteenth Amendment." Id. at 4073. Of course, no such exercise of Congressional power supports the lower court's decision in this case.**/

---

*/ The Terrazas case was not discussed in the jurisdictional statement because that statement was prepared before Terrazas was decided. The motion to dismiss or affirm does not refer to it.

**/ The Court's reliance on the Congressional determination appears throughout its discussion. For example, the Court distinguished earlier cases as ones "none of [which] involved a congressional judgment," and it declined to "hold that Congress has exceeded its powers" in defining the standard of proof. Id. at 4073. Even with this Congressional determination, two members of this Court dissented on the burden of proof issue and two others dissented on other grounds without discussing the burden of proof.

III. DUE PROCESS FORBIDS TERMINATION FOR LACK OF A COMPELLING STATE INTEREST.

The jurisdictional statement asserted as the third issue for plenary consideration appellants' claim that the State must establish a compelling state interest before terminating the family relationship, and such an interest in this case could only be demonstrated by finding that termination was necessary to protect the children from harm. In other words, whatever other methods the State might employ to discourage incest or a "nomadic" family existence (App. 2d), it cannot deter such conduct by taking children away from their parents in the absence of a finding of harm to those children.

The State's motion clearly frames the issue by asserting that "the compelling state interest test is not applicable here." State motion 19. However, in Roe v. Conn, supra, a three-judge federal district court struck down a statute authorizing removal of a child from an "unfit or improper" home on the explicit ground that parental rights could be abrogated "only to advance a compelling state interest and pursuant to a narrowly drawn statute"; and the court further held that the interest would "become 'compelling' enough" to justify termination "only when the child is subjected to real physical or emotional harm and less drastic measures would be unavailing." 417 F. Supp. at 779. In light of this direct conflict, the first branch of the State's argument is no basis for summary disposition in the State's favor. */

*/ This Court's decisions, although not directly resolving the issue in the context of TPR proceedings, do support application of the compelling state interest test. See J.S. 23. By contrast, neither Pierce v. Society of Sisters, 268 U.S. 510 (1925), nor Wisconsin v. Yoder, 406 U.S. 205 (1972), cited by the State's motion (pp. 19-20), lend any support to the view that the family relationship may be severed without a compelling state interest. Pierce struck down a far milder requirement that children be required to attend public schools and Yoder sustained the parents' religious right to provide home education.

The State is on equally weak ground in arguing that the evidence supported a finding that termination of parental rights was necessary in this case to protect "the welfare of the children." State motion 21. There were no findings of any kind by the trial court or by the state Supreme Court to show that the children had ever suffered any harm or would suffer any harm from remaining with their natural parents.*/ Manifestly, the lower court decisions neither applied the correct constitutional standard nor made the findings necessary to comport with it. The decisions cannot be sustained summarily on the speculation that they might have made such findings if the lower courts had understood what the Constitution required.

Although the constitutional standard is the question presented for review, it should be emphasized that most of what the State's motion presents as "fact" has no relation to the lower courts' circumspect and limited findings.**/ However, so far as the findings and evidence may be relevant in determining

---

*/ The decisions of both lower courts are conspicuous in their failure to address the impact of the conduct relied on upon the children. The focus of both opinions is on the convictions of the parents, their "frequent changes in home surroundings," and the parents' "employment record." See App. 14a. See also App. 3d. There is no assertion that the circumstances relied upon have harmed or will harm the children; there is only the concealing generality that it is in the children's "best interests" that they be removed.

**/ It is utterly untrue, for example, to assert that "the father was shown to have sexually toyed with his four-year old daughter" (State motion 21; see also id., p. 6, n.28), when the charge was flatly denied by the father and no such finding was made by the lower courts. Compare, e.g., App. 3d. The implied assertion that one of the children was scarred by her earlier experiences with her parents is also a patent misdescription; not only is there no finding to that effect, but the actual testimony was that it was the State's foster treatment of the child that inflicted harm. See p. 5, n.*, above. No finding of any kind was made that the children's home life was "chaotic" (compare State motion 8); on the contrary, the most specific finding was that "during the past year . . . [the parents'] employment record and place of living has remained stable." App. 3d.

whether this is a proper case for plenary review, it is difficult to imagine a TPR proceeding more redolent of injustice. The children have been taken permanently from a home admittedly stable at the time of the separation (see App. 3d) with no finding of actual harm to the children (see p. 8, above), based on testimony by two psychiatrists who had never examined the children or the parents (J.S. 6-7) and a double hearsay "social report" so untrustworthy that the lower court itself found it impossible to stomach. See App. 11a-12a; J.S. 6. If there were ever a case appropriate for deciding that a compelling state interest and a finding of actual harm are constitutionally required, it is precisely this case.

CONCLUSION

For the reasons stated in the jurisdictional statement and in this opposition, this appeal should not be decided summarily but should be set for plenary hearing.

Respectfully submitted,

MICHAEL BOUDIN
ROBERT J. GAGE
GREGG H. LEVY
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
202-452-6000

GARY A. MYERS
Community Legal Aid Society Inc.
144 East Market Street
Georgetown, Delaware 19947
302-856-0038

February 1980